

NO. 86-319

Supreme Court, U.S.
FILED

FEB 3 1987

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

JOHN R. VAN DRASEK,

Petitioner,

v.

**JOHN LEHMAN,
SECRETARY OF THE NAVY,
CHAPMAN COX,
ASSISTANT SECRETARY OF THE NAVY
FOR MANPOWER AND RESERVE AFFAIRS,
AND
THE UNITED STATES OF AMERICA**

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

JOINT APPENDIX

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**Petition for Certiorari filed August 28, 1986
Certiorari Granted December 1, 1986**

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NOTATION REGARDING ITEMS ALREADY REPRODUCED

The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

Order of the United States Court of Appeals for the Federal Circuit (Rich, Baldwin and Bennett, Circuit Judges), dated January 23, 1986	App. 1
Opinion of the United States District Court for the District of Columbia (Richey, District Judge), dated December 6, 1983	App. 2
Opinion of the United States Court of Appeals for the District of Columbia Circuit (Tamm, Mikva and Edwards, Circuit Judges), dated May 31, 1985	App. 9

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CIVIL ACTION NO. 83-1761

JOHN R. VAN DRASEK,
Plaintiff,

v,

JOHN LEHMAN, *et al.*
Defendants.

RELEVANT DOCKET ENTRIES

DATE PROCEEDINGS

1983

June 17 COMPLAINT: appearance; attachments.

June 17 APPLICATION by pltf. for temporary restraining order.

June 17 MOTION by pltf. for preliminary injunction, declaratory relief and mandamus.

June 17 MEMORANDUM by pltf. of points and authorities in support of pltf.'s application for temporary restraining order and motion for preliminary injunction, declaratory relief, and mandamus.

June 17 APPLICATION of pltf. for a TRO begun; respite to 6-20-83, 3:00 p.m. (Rep: E. Olsen)
PARKER, J.

June 20 APPLICATION of pltf. for a TRO resumed. Pltf. agrees to withdraw his application for a TRO & motion for preliminary injunction so that the case may be remanded. A stipulation shall be submitted to chambers by 6-22-83. (Rep: E. Olsen)
PARKER, J.

- June 20 AFFIDAVIT of Mr. W. Dean Pfeiffer submitted by defts.
- June 20 AFFIDAVIT of Mr. William R. Wright, attachment, submitted by defts.
- June 20 MEMORANDUM by pltf. of points and authorities in opposition to review of denial of pltf's complaint pursuant to article 138, U.C.M.J. (1969), 10 U.S.C. 938 (1976), at the board for correction of naval records.
- June 27 JOINT STIPULATION withdrawing pltf.'s application for TRO and motion for preliminary injunction; pltf, consents to stay proceedings pending pursuit of his administrative remedies before BCNR; should either party fail to carry out its part of this agreement in whole or in part, the other party may apply to this Court for enforcement of this agreement; approved and so ordered. (fiat) (N) (signed 6-25-83) PARKER, J.
- Sept. 8 ORDER filed 8-31-83 dismissing action with Pltf. having leave to reapply to have his case reinstated after the exhaustion of his administrative remedies. (N) RICHEY, J.
- Oct. 31 MOTION by pltf for reinstatement; P&A's; affidavit of counsel regarding procedural history and attempts to exhaust administrative remedies, and in support of motion to reinstate verified complaint for temporary restraining order, injunctive relief, declaratory judgment and mandamus.
- Oct. 31 STATUS CALL: Court reinstates case; Motion of Pltf. for TRO heard and granted; Pltf. to post bond (surety) in the amount of \$250.00. (Rep: G. Slodysko) RICHEY, J.

- Oct. 31 ORDER filed reinstating case. (N) RICHEY, J.
- Oct. 31 TEMPORARY RESTRAINING ORDER; pltf. to post a cash bond of \$250.00. (signed 4:45 P.M.) (N) RICHEY, J.
- Nov. 1 DEPOSIT by Pltf. for security of costs in the sum of Two Hundred Fifty Dollars (\$250.00).
- Nov. 1 COMPLAINT (Verified) by Pltf.
- Nov. 1 APPLICATION by Pltf. for temporary restraining order.
- Nov. 1 MOTION by Pltf. for preliminary injunction, declaratory relief and Mandamus.
- Nov. 1 MEMORANDUM by Pltf. of points and authorities in support of Pltf.'s application for temporary restraining order and motion for preliminary injunction, declaratory relief, and mandamus.
- Nov. 2 NOTICE by Defts. of filing the attached memorandum for the Secretary of the Navy dated 10-18-83; Attachment.
- Nov. 8 MEMORANDUM of points and authorities of pltf in response to the honorable court's query as to whether pltf's claims for equitable and monetary relief should be jointly heard by the United States Claims Court or this Court, or whether each Court must take cognizance of that portion of pltf's claims over which they have exclusive jurisdiction.

- Nov. 10 AMENDED VERIFIED COMPLAINT by Pltf.
- Nov. 10 STATUS REPORT by Defts.
- Nov. 15 STIPULATION filed 11-10-83 extending Temporary Restraining Order to 12-6-83; Directing that Defts. will file a dispositive motion on 11-21-83; Directing Pltf. to respond on 11-28-83, so ordered. (fiat) (N) RICHEY, J.
- Nov. 17 TRANSCRIPT OF PROCEEDINGS, 6-17-83, pp. 24. (Rep: M. E. Olsen)
- Nov. 17 TRANSCRIPT OF PROCEEDINGS, 6-20-83, pp. 8, (Rep: M.E. Olsen)
- Nov. 18 TRANSCRIPT OF PROCEEDINGS, 10-31-83, pp. 33 (Rep: G. A. Slodysko)
- Nov. 21 MOTION by defts. to dismiss or, in the alternative, for judgment of affirmance; P/A; (Administrative Record 8).
- Nov. 29 MOTION by Pltf. for leave to file Pltf.'s motion in opposition to Defts.' motion and Pltf.'s cross-motion for judgment on the merits nunc pro tunc; P & A's: EXHIBIT (Motion in opposition to Deft.'s motion to dismiss, or, alternatively, and Pltf.'s cross-motion for judgment on the merits)
- Dec. 6 ORDER filed 12-1-83 extending time one (1) day for Pltf. to file its motion in opposition to Defts.' motion and its cross motion for judgment on the merits. (N) RICHEY, J.

- Dec. 6 MOTION filed 12-2-83 by Pltf. in opposition to Deft.'s motion to dismiss or, alternatively, for judgment of affirmance and Pltf.'s cross-motion for judgment on the merits; P & A's.
- Dec. 6 REPLY filed 12-5-83 by Defts. to Pltf.'s opposition to Defts.' motion to dismiss or, in the alternative, for judgment of affirmance.
- Dec. 6 NOTICE by Pltf. of filing the attached corrected memorandum of points and authorities to the one filed November 29, 1983; Attachment.
- Dec. 12 MEMORANDUM Opinion filed 12/6/83.
RICHEY, J.
- Dec. 12 ORDER filed 12/6/83 affirming judgment of Secretary of Navy; dismissing case with prejudice. (N) RICHEY, J.
- Dec. 22 NOTICE OF APPEAL by pltf. from order entered 12-12-83; \$5.00 USDC fee and \$65.00 USCA fee paid and credited to U. S. Treasury; copy of notice sent to: Charles Gross and William Birney.
- Dec. 29 COPY of Notice of Appeal and docket entries transmitted to USCA; USCA#83-2343.

DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
WASHINGTON, D.C. 20370

JSR:vmt
7015-83
7 November 1983

From: Chairman, Board for Correction of Naval Records

To: Secretary of the Navy

Subj: VAN DRASEK, John R., Jr., CAPT, USMC,
474 48 50 84; Review of naval record

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 23Jun83 w/ copy of amended
verified complaint

(2) Copy of record of proceedings under Article
138, UCMJ

(3) Transcript of oral hearing w/exhibits 63-66

(4) Examiner's brief dtd 7Oct83 less tabs

(5) *Issues Presented by Petitioner's Application*
w/exhibits 1-62

(6) PERB report, HQMC (MMCP) memo dtd
22Sep83 w/enclosures (1) - (5)

(7) Fitness Report Brief dtd 1Jul83

(8) HQMC (MMOS-2) memo dtd 31Oct83

(9) Officer's microfiche record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed written application, enclosure (1), with this Board requesting, in effect, the following corrective actions:

- a. Locate at least six unspecified fitness reports alleged to have been missing from Petitioner's naval record as of 10 June 1983, inform Petitioner of the circumstances surrounding their absence and make them available to him.
 - b. Remove from petitioner's naval record the fitness reports for the periods 23 June 1981 to 30 November 1981 and 1 October 1981 to 31 May 1982 and insert in their place new fitness reports that reflect the true nature of Petitioner's fitness as a Marine Corps officer. Copies of the contested reports are at Tabs A and B, respectively.
 - c. Direct Petitioner's reconsideration for promotion to major and if he is selected, award him the back pay to which he would have been entitled, had he been selected by the first board before which he failed of selection.
 - d. Make certain revisions of the record of proceedings regarding Petitioner's complaint of wrongs under Article 138, Uniform Code of Military Justice (UCMJ) or cause a new investigation of the complaint to be conducted. A copy of the record of proceedings under Article 138 is at enclosure (2). By letter dated 6 October 1983, the Executive Director of the Board advised Petitioner's attorney that "... it is the position of the Board that this request [request d.] is beyond the scope of corrections traditionally made by the Board."
2. The Board, consisting of Messrs. Cross, Herman and Singer, conducted a hearing in this case on 21 October 1983. Petitioner appeared with counsel; he and two other witnesses testified. Enclosure (3) is the verbatim transcript of the hearing. In addition to the evidence and argument

presented at the hearing, the Board considered enclosures (1) and (2) and (4) through (9) to this report; naval records, and applicable statutes, regulations and policies. The Board completed its deliberations on 7 November 1983.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegation of error and injustice, finds as follows:

a. Prior to filing his application with this Board, Petitioner exhausted all administrative remedies afforded him under existing law and regulations within the Department of the Navy.

b. Petitioner was assigned to duty at OCS (Officer Candidates School), MCDEC (Marine Corps Development and Education Command), Quantico, Virginia from 23 June 1981 through 28 September 1982. The officer who served as the Commanding Officer (CO), OCS during that entire period acted as Petitioner's reporting senior on his fitness reports for the periods 23 June 1981 to 30 November 1981 and 1 December 1981 to 31 May 1982, during which Petitioner served as Director, NCO Leadership School (NCOLS). He acted as reviewing officer on Petitioner's fitness reports for the periods 1 June 1982 to 27 August 1982 and 28 August 1982 to 28 September 1982, during which Petitioner was officially designated as an academic officer. Petitioner asserts that the report ending 27 August 1982 is a fair evaluation. The report ending 28 September 1982 is a "not observed" report. Copies of those two uncontested reports are at Tabs C and D, respectively.

c. On 8 September 1981, the CO, OCS submitted Petitioner's fitness report for the period 23 June 1981 to 30 November 1981. He was marked "excellent" in item 15a. ("General Value to the Service"); the distribution in item 15b. showed him last of four officers rated. He was marked "Be Glad" in item 16. ("Considering the Requirements of Service in War, Indicate Your Attitude toward Having this Marine Under Your Command"). This report included no

unfavorable narrative comments. The stamp on this report indicated that it arrived at Headquarters Marine Corps (HQMC) by 12 January 1982.

d. Petitioner was considered as an officer in the zone by the 1982 Major Selection Board. He failed of selection before that board, which convened on 7 April 1982 and concluded on 13 April 1982.

e. On 14 June 1982, the CO, OCS submitted Petitioner's fitness report for the period 1 December 1981 to 31 May 1982. He was marked "excellent" in item 15a; the item 15b. distribution showed him last of three officers rated. He was marked "Particularly Desire" in item 16. This report included no unfavorable narrative comments. The stamp on this report shows that it arrived at HQMC by 28 June 1982.

f. By orders dated 2 July 1982, the Commanding General (CG), MCDEC appointed Petitioner and four other officers to serve on MCDEC administrative discharge board (ADB) 6-82 for the period 1 July-31 December 1982. Petitioner was the only appointee from OCS. Paragraph 3.a. of MCDEC Order 5420.13C dated 3 April 1981 stated, in pertinent part, that "Personnel [for ADB duty] will be nominated for a 6-month period. Therefore, no nominee shall be in receipt of or be expecting receipt of PCS [permanent change of station] orders . . . during the period for which nominated."

g. On 16 July 1982, ADB 6-82 unanimously recommended that the respondent, who was undergoing administrative discharge processing for drug abuse, be retained in the Marine Corps. On 6 August 1982, the CO, OCS, without authority from the CG, MCDEC, had Petitioner removed from a case to be reviewed by ADB 6-82. On 10 August 1982, ADB 6-82, including Petitioner, unanimously recommended that a different respondent be discharged for drug abuse and misconduct, but that he receive an honorable discharge.

h. By orders dated 10 August 1982, Petitioner's transfer from OCS effective 13 August 1982 was directed.

i. By orders dated 12 August 1982, an officer was named to replace Petitioner on the MCDEC ADB.

j. On 13 August 1982, Petitioner had a transfer debrief with the CO, OCS.

k. On 15 August 1982, Petitioner broke his leg in a parachuting accident.

l. By orders dated 17 August 1982, the orders of 10 August 1982 for Petitioner's transfer from OCS effective 13 August 1982 were cancelled.

m. Petitioner's fitness report for the period 1 June 1982 to 27 August 1982 was submitted on 27 August 1982 and reviewed without comment by the CO, OCS on 1 September 1982. In this report, Petitioner was marked between "excellent" and "outstanding" in item 15a. In item 15b., six officers were rated with him, five above him and none below him. He was marked "Particularly Desire" in item 16.

n. Effective 28 September 1982, Petitioner was transferred from OCS. His transfer fitness report for the period 28 August 1982 to 28 September 1982 was a "not observed" report. It was submitted on 7 October 1982 and reviewed without comment by the CO, OCS on 8 October 1982.

o. By letters dated 29 September and 8 October 1982, Petitioner initiated a complaint of wrongs under Article 138, UCMJ against the CO, OCS. He alleged that the CO, OCS exerted improper influence on OCS personnel with regard to their testifying on behalf of Marines who were the subject of judicial or administrative discharge actions and with regard to their voting practices as members of courts-martial and ADB's. He also complained that his removal from the MCDEC ADB and his transfer from OCS had been in reprisal for his part in the ADB decision of 16 July 1982 to retain the respondent.

p. By third endorsement of 26 November 1982 on Petitioner's complaint of 8 October 1982, the CO, OCS responded to that complaint. He asserted, in part, that as early as spring 1982, he had contemplated effecting Petitioner's transfer in summer 1982 because of his dissatisfaction with Petitioner. He stated that Petitioner had had difficulty getting along with the staff and that he would not accept responsibility for problems. He further stated that as a result of his meeting with Petitioner on 13 August 1982, he decided to keep him at OCS, but then decided to transfer him as a result of his subsequent parachute injury. Attached to this endorsement were four statements obtained by the CO, OCS. Petitioner contends that it was improper for the CO, OCS to have obtained those statements. He asserts it is unlikely that the CO, OCS was contemplating his transfer as early as he states, because the officer with whom he allegedly discussed such transfer did not recall such a discussion, and because Petitioner probably would not have been assigned to a six-month term with the ADB on 2 July 1982 if his transfer that summer had already been contemplated. In the latter connection, Petitioner cites MCDEC Order 5420.13C, quoted at paragraph 3.f. above. He complains that although he was assigned an attorney to assist him in responding to the CO, OCS, he was not permitted to enter an attorney-client relationship with him.

q. By fourth endorsement of 14 January 1983 on Petitioner's complaint of 8 October 1982, Petitioner responded to the CO, OCS third endorsement. Petitioner's fourth endorsement included enclosures (7) through (35).

r. On 20 January 1983, the CG, MCDEC appointed an officer to investigate Petitioner's complaint under Article 138. That officer's final report, dated 28 February 1983, concluded that the CO, OCS did not commit the wrongs alleged by Petitioner. However, he did find that a number of officers at OCS perceived that they were subject to pressure with regard to testifying and voting in courts-martial and administrative discharge actions. Petitioner complains that

the investigating officer reported conclusions inconsistent with the evidence and failed to obtain statements from witnesses who would have supported Petitioner.

s. On 8 March 1983, the 1983 Major Selection Board convened. Petitioner was considered, but not selected. That board adjourned on 7 April 1983. By consequence of Petitioner's having sustained two failures of selection for promotion to major, he is subject to mandatory discharge on 1 November 1983 or as soon thereafter as he completes physical disability processing.

t. The action of the CG, MCDEC on Petitioner's complaint under Article 138 issued on 4 April 1983. He directed that steps be taken to ensure that proper practices are followed by MCDEC with regard to appointing and relieving members of ADB's, that the CO, OCS make it clear to his subordinates that they are subject to no improper influence with regard to judicial and administrative proceedings, and that the CO, OCS be advised of evidence in the report of investigation that female Marines at OCS perceived that they were receiving inappropriate treatment. This action was reviewed by the Office of the Judge Advocate General on 25 April 1983 and approved by the Secretary of the Navy on 17 May 1983.

u. Petitioner filed a complaint in the United States District Court for the District of Columbia. That judicial action was dismissed without prejudice on 31 August 1983 pending Petitioner's exhaustion of his remedies before the Board. A copy of the complaint is at enclosure (1). On 31 October 1983, the court issued a temporary restraining order against Petitioner's discharge from the Marine Corps.

v. Petitioner's initial application to the Board, dated 23 June 1983, requested the same relief sought in his complaint, to the extent that such relief was "... within the Board's power to grant."

w. By letter dated 9 July 1983, Petitioner's counsel supplemented the original application with a list of *Issues Presented by Petitioner's Application*. That document, with its 62 exhibits, is at enclosure (5).

x. In enclosures (1) and (5), Petitioner alleges, in essence, that he was dismissed from duty with the ADB, transferred from OCS and failed of selection by the 1983 Major Selection Board in reprisal for his votes on the ADB of 16 July 1982 and 10 August 1982 and for his verbal and written complaints against his superiors. He alleges that the contested fitness reports signed by the CO, OCS are inaccurate appraisals of his performance. He contends that these fitness reports, in conjunction with an incomplete record of his performance, contributed to his failures of selection for promotion. He contends that there is substantial evidence indicating that the CO, OCS is insensitive to the protection of individual rights, that he is willing to break the law and violate individual rights to achieve a desired result, and that he has poor judgment. The evidence he cites in that connection includes the fact that on 11 February 1982, the CO, OCS signed OCS order P1530.20 (copy at enclosure (5), exhibit 58), which specifically dictates that males be selected for certain billets at OCS; the fact that on 26 January 1982, the CO, OCS signed OCS order 5355.2 (copy at enclosure (5), exhibit 57), paragraph 6.a. of which provides that "Positive [urinalysis] test results are considered 100% accurate;" the fact that on 6 August 1982, he illegally had Petitioner removed from the ADB without authority of the CG, MCDEC, who had originally appointed him; and the evidence, adduced in the investigation of Petitioner's Article 138 complaint, that the CO, OCS had made statements leading his subordinates to believe that he would disapprove if they either testified or voted as court or board members in favor of individuals against whom the command was attempting to take judicial or administrative discharge action.

y. On 21 September 1983, the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB) considered Petitioner's case and voted to deny relief. The report of the PERB, dated 22 September 1983, reflects that Petitioner's request for removal of the fitness reports ending 30 November 1981 and 31 May 1982 was denied in substantial reliance on an opinion from the Judge Advocate Division (Code JA), HQMC. The PERB also considered inputs from the following offices within HQMC: Fitness Report Section (Code MMOS-2), Promotions Branch (Code MMPR) and Career Planning Branch (Code MMCP). The PERB report, the inputs from Codes MMOS-2, MMPR and MMCP, and the opinion from Code JA are at enclosure (6).

z. Code MMOS-2 advised that there are gaps in Petitioner's fitness report record for 13 July to 1 August 1973, 9 October 1975 and 1 June to July 1980. However, that office attributed those gaps to administrative error in the reporting dates.

aa. Code MMCP expressed the opinion that removal of the four OCS fitness reports would have had "little impact" on Petitioner's competitiveness for promotion.

bb. Code JA concluded that the Board should not act as a reviewing authority for appeals of unsuccessful complaints under Article 138, UCMJ, so that the only portion of Petitioner's application properly before the Board was that which pertained to the contested fitness reports and the failures of selection for promotion. Code JA concluded, in essence, that the evidence does not support Petitioner's contentions. Code JA noted that the contested fitness reports, as well as Petitioner's first failure of selection for promotion, preceded his vote on the ADB on 16 July 1982. Code JA also noted that the contested fitness reports are not substantially different from either the unchallenged fitness report (for the period 1 June to 27 August 1982) which immediately follows those reports or from the other uncontested reports in Petitioner's record.

(Petitioner's Fitness Report Brief as of 1 July 1983 is at enclosure (7); his microfiche record as of August 1983 is at enclosure (9)). Code JA stated that "There is absolutely no evidence of record that the second [1983] selection board members had knowledge of any of the events upon which [Petitioner] premises this retaliation theory [that he was the subject of retaliation for his complaints to the CO, OCS and others as well as his filing of the Article 138 complaint]." In regard to the MMCP opinion discussed at paragraph 3.aa. above, Code JA stated that "... the Board should not usurp the functions of a selection board . . ." and that "If it is determined that the presence of one or more of these [contested fitness] reports may have contributed to [Petitioner's] nonselection, and that such report was erroneous or unjust, [Petitioner] should be afforded appropriate relief."

cc. At the oral hearing, Petitioner's counsel argued that the Board could properly entertain Petitioner's request for correction of the record of proceedings under Article 138, UCMJ even though that record does not appear in Petitioner's own military personnel or medical record, because it is a naval record, and the words of reference (a) are clear without resort to legislative intent.

dd. Testimony was offered at the hearing by Petitioner and two other witnesses: a former Marine Corps officer who had served with Petitioner at OCS while Petitioner was the Director, NCOLS and a female Marine captain who also had served with Petitioner at OCS. Petitioner testified that in October 1981, he decided that pregnant Marines should be allowed to attend NCOLS and that the CO, OCS reluctantly agreed to this departure from previously established policy at OCS. The former officer testified that the CO, OCS and Petitioner clashed not only on the issue of admitting pregnant Marines to OCS, but also on other issues as well. He stated that the CO, OCS did not like subordinates to take issue with him as Petitioner did. He expressed the opinion that Petitioner deserved much better

fitness reports than those he received from the CO, OCS for his service at the NCOLS. The female officer testified that under the CO of concern in this case, the environment at OCS left much to be desired in terms of sensitivity to women's issues. She stated that she regarded Petitioner as a model of what a Marine Corps officer should be. Petitioner testified that immediately after he had informed the CO, OCS that the ADB had recommended retention in the case heard on 16 July 1982, Petitioner overheard, from the passageway outside the CO's office, an angry reaction from that officer. Petitioner stated that at his transfer debrief on 13 August 1982, he complained to the CO, OCS that he believed his transfer orders had been issued in response to his having voted as he did on the ADB. He testified that after his orders for transfer effective 28 September 1982 issued, he had to ask the CO, OCS for a debrief, whereas such a meeting was ordinarily a matter of course. Finally, he testified that at that meeting, the CO, OCS acknowledged that he felt Petitioner had displayed poor judgment by his vote on the ADB case heard on 16 July 1982.

ee. At the hearing, Petitioner's counsel argued that the 1983 Selection Board most probably knew about Petitioner's complaint against his superiors and held it against him. He asserted that the promotion board could not have had a valid basis for not selecting Petitioner, because his record was so competitive on its face. He alleged that Petitioner's record before the 1982 Selection Board was incomplete, because his exhibit 65 (at enclosure (3)) shows that the fitness reports for the periods 1 June 1978 to 31 October 1978 and 1 November 1978 to 31 May 1979 were "processed" by HQMC on 23 April 1982, after that promotion board had adjourned. He further alleged that Petitioner's record before the 1983 Selection Board was incomplete, because it lacked his latest fitness reports, for the periods 1 December 1982 to 24 February 1983 and 25 February 1983 to 31 May 1983 (exhibits 63 and 64 at enclosure (3)). Finally, he alleged that Petitioner's record was incomplete before both promotion boards, because his

exhibit 66 (at enclosure (3)) shows that the fitness reports for the periods 1 October 1974 to 22 November 1974 and 10 October 1975 to 31 January 1976 were "processed" by HQMC on 5 August 1983, after both boards had adjourned; because a fitness report for the period 23 November 1974 to 27 January 1975 does not appear on his brief sheet (enclosure (7)), although it appears in his official record; because his "not observed" fitness report for the period 11 July 1979 to 28 March 1980, although it appears in his official record and on his brief sheet, includes narrative comments that are not reflected on the brief sheet; and because his fitness report for the period 2 July 1980 to 30 November 1980 is not in his official record, although it appears on his brief sheet.

ff. Enclosure (8) is an advisory opinion from the Fitness Report Section, HQMC addressing Petitioner's contentions regarding incompleteness of his record before the 1982 and 1983 Major Selection Boards. It states that the processing dates reflected on Petitioner's exhibits 65 and 66 have no correlation with the dates on which the fitness reports involved were received; that the fitness report ending 24 February 1983 was provided to the 1983 Selection Board and that the report ending 31 May 1983 could not possibly have been before that board; that the report for the period 23 November 1974 to 27 January 1975 and the narrative comments in the report for the period 11 July 1979 to 28 March 1980 were in Petitioner's official record before both boards; and that although the report for the period 2 July to 30 November 1980 cannot be located, the marks from that report were available to both boards.

gg. Petitioner's record before both the 1982 and 1983 promotion boards reflected a number of uncontested fitness reports in which other officers were rated clearly above Petitioner; it included two uncontested transfer fitness reports, for the periods 1 December 1980 to 6 April 1981 and 13 May 1981 to 22 June 1981, which were clearly less

favorable than the immediately preceding reports at the same station (2 July 1980 to 30 November 1980 and 1 April 1981 to 12 May 1981, respectively), thereby indicating a declining trend of performance; and it reflected the following comments in the uncontested report for the period 1 December 1980 to 6 April 1981:

Despite his knowledge of ground reconnaissance, the necessary professional and personal relations between himself and certain key members in the Battalion never developed as they should have. As a result, his potential was never fully realized as the Operations Officer. He is aware and concerned over the situation and the resultant gulf that existed. In spite of efforts on both sides of the problem, the gulf was not bridged and in the best interests of all concerned, I have transferred [Petitioner].

CONCLUSION:

After due consideration of the arguments of Petitioner's counsel, the Board finds that his request for correction of the record of proceedings under Article 138, UCMJ is not a matter properly before the Board. In that regard, the Board particularly notes that this record of proceedings does not appear in Petitioner's military personnel record (enclosure (9)). The Board adopts the position stated by the attorney-advisor assigned to this case (see transcript of oral hearing, enclosure (3), pp. 6 and 7).

The Board finds that Petitioner's official record is lacking his fitness report for the period 2 July 1980 to 30 November 1980. The Board feels that efforts should be made to locate that report, which apparently must have been submitted, inasmuch as it is reflected on Petitioner's fitness report brief (enclosure (7)).

The Board is unable to find that the contested fitness reports for the periods 23 June 1981 to 30 November 1981

and 1 October 1981 to 31 May 1982 are either erroneous or unjust. The Board notes that evidence, summarized at paragraph 3.dd. above, was adduced at the hearing to the effect that Petitioner had policy conflicts with the CO, OCS as early as October 1981 and that Petitioner should have received better fitness reports than he did for his performance at the NCOLS. The Board also notes that there is substantial additional evidence of record raising questions about the judgment and fairness of the CO, OCS. In that connection, the Board finds the evidence sufficient to establish that the CO, OCS may well have allowed Petitioner's voting on the ADB to influence his decision to seek Petitioner's transfer from OCS. Nevertheless, the Board is not convinced that the CO, OCS was generally deficient in judgment and fairness, such that he should be considered incapable of submitting fair and accurate appraisals of his subordinates' performance. In concluding that the contested fitness reports should not be removed, the Board particularly notes that they are "excellent" reports and that they include no unfavorable narrative remarks. The Board finds that these fitness reports are not aberrant when compared with the other reports in Petitioner's record. Finally, the Board notes that neither of these reports could have been influenced by Petitioner's voting on the ADB, because he was not appointed to serve on the ADB until after reports had been submitted.

The Board is unable to find that either of Petitioner's failures of selection for promotion was erroneous or unjust. As stated above, the Board finds no basis for removal of either of the two contested fitness reports signed by the CO, OCS, and thus the Board finds nothing objectionable in the fact that one or both of those reports was in Petitioner's record before the 1982 and 1983 promotion boards. The Board finds that Petitioner's record before both boards was substantially complete, despite the absence of the five-month report for the period 2 July to 30 November 1980. The Board is not persuaded by the evidence of record that the 1983 Selection Board was even aware of Petitioner's complaint against his superiors, much less that the board

improperly held against him the fact that he exercised his rights under Article 138, UCMJ. The Board does not accept Petitioner's contention that his record before the 1983 Selection Board was so good that his failure to be selected must have been based on improper considerations. In that regard, the Board takes special note of the matters cited at paragraph 3.gg. above.

The Board does not deem it necessary to submit, pursuant to its authority under Section 6.(a)(4) of its regulations (32 C.F.R. 723.6(a)(4)), separate correspondence to the Secretary of the Navy as to matters arising from but not directly related to the issues of this case.

In view of the foregoing, the Board recommends the following limited corrective action:

RECOMMENDATION:

a. That the Commandant of the Marine Corps be directed to take all reasonable steps to locate and file in Petitioner's naval record his fitness report for the period 2 July 1980 to 30 November 1980.

b. That this record of proceedings be returned to this Board for retention in a confidential file maintained for such purpose, with no reference thereto being made a part of Petitioner's naval record.

c. That the remainder of Petitioner's request be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above-entitled matter.

ROBERT D. ZSALMAN
Recorder

/s/ JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing recommendation of the Board is submitted for your review and action.

Reviewed and approved: 9 Nov 1983
/s/ CHAPMAN B. COX
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

/s/ W. DEAN PFEIFFER